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No. 771

In the

Supreme Court of the United States

OCTOBER TERM, 1964.

JAMES A. PETERSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOSEPH M. SOLON,
208 South La Salle Street,
Chicago, Illinois, 60604

ANNA R. LAVIN
209 South La Salle Street,
Chicago, Illinois, 60604
Attorneys for Petitioner

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JAMES A. PETERSON,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, James A. Peterson, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The special findings and judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was entered on January 10, 1964, and is not yet reported, but appears in the printed appendix filed

with, and certified by, the Clerk of the United States Court of Appeals as a part of this record, and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed on the 20th day of October, 1964. That opinion is not yet reported, but is set forth in the appendix hereto, and in the certified copy of the record.

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was filed on the 20th day of October, 1964. On November 17, 1964, it was ordered that the Petition for Rehearing be denied. These orders appear in the appendix hereto. This Petition is filed within thirty days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Can a conviction stand where the trial court considered the necessary element of "wilfulness" under Section 7201 of the Internal Revenue Code of 1954 to be satisfied by "wilful negligence"?

2. Can good character evidence be perverted into evidence against a defendant on the basis that apparent generosity and integrity are a recognized facade of the professional gambler?

3. Can a finding of guilt be based on suspicions arising from the personal investigations of a trial judge?

4. Does the requirement that a defendant in a net worth case assume the explanation of a "bulge" impose upon him the burden of proving himself innocent?

STATUTE INVOLVED

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 851." 26 U.S.C. 7201

STATEMENT OF THE CASE

This is an appeal frm a judgment of conviction on five counts of a five count indictment charging violations of Section 7201 of the Internal Revenue Code of 1954, (26 U.S.C., Section 7201), in that he did wilfully evade income taxes for the years 1956 through 1960. The case was tried to the Court sitting without a jury, said jury having been waived, and the Court returned a judgment of conviction on the five counts comprising the indictment, and sentenced this petitioner to a period of two years in prison on each of the first four counts of the indictment, the sentences to be served concurrently. Petitioner was placed on three years probation on the fifth count, the probationary period to commence following the termination of the prison sentence. Petitioner was also fined a sum of $7,500.00, plus costs, on Count 1. The Court made the sentence on Counts 1 through 4 subject to the provisions of Section 4208(a)(2) of Title 18, U.S.C. It was from this conviction and sentence that an appeal was taken to the United States Courts of Appeals for the Seventh Circuit.

The errors complained of in the Court of Appeals were: that the trial court erred in basing its ultimate finding of guilt upon findings which were not supported by the evidence or were contrary to the evidence; that it disregarded evidence which had a bearing on the question of whether the petitioner wilfully attempted to evade the payment of his income taxes; that the trial court erred in basing its ultimate finding of wilfulness on the finding of the petitioner's complete inability to make a reasonable explanation for the discrepancy between his admitted net worth and the amount reported for income tax purposes; and that the trial court erred in equating "wilfulness" with "gross negligence" and basing its ultimate finding of guilt on findings which were either not supported by the evidence, or contrary to the evidence, or lacked substantial support in the evidence.

The United States Court of Appeals for the Seventh Circuit, as is stated hereinbefore, affirmed the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, and denied the defendant's Petition for Rehearing. (A. 1a-7a)

STATEMENT OF FACTS

The Government used the so-called net worth plus nondeductible expenditures method in establishing petitioner's failure to report the correct amount of his income during the years covered by the indictment. The proof showed yearly increases in net income approximately in the same amounts as charged in the indictment. The total unreported income for the five-year period approximately $80,000 and the understated tax liability exceeded $31,000. Petitioner stipulated to the correctness of the Government's net worth statement, exclusive of cash on hand, and did not dispute the tax liability. (A. 1a-2a)

The petitioner, James A. Peterson is 47 years of age. He was married in Birmingham, Alabama in 1938 and has two children, ages 18 and 22. The younger child is a daughter attending high school, and the older child is a son who is in the United States Army. (A. 145) He was born on a farm in Alabama and as a child worked on the farm. His only schooling was had for about 2½ to 3 months each year during the Winter months. The rest of the year he worked as a farm hand. (A. 146-147)

He only completed the fourth grade in grammar school (A. 147) when he was 15 years of age, at which time he ceased going to school and started to work constantly; for a time he worked on the farm as a tenant farmer, later going to Birmingham where he did menial jobs. (A. 147-149). In 1935 he came up North and worked in the steel mills in 1936 and 1937, making 44 cents per hour. (A. 150) He returned South in 1937 and worked in both Florida and Alabama on menial tasks and came back to the Hammond area in 1941. (A. 151-152) He went back to work in the steel mills until about 1945 when he left the mills and started to work in a pool room. (A. 152-153)

Petitioner is presently a professional gambler in East Chicago, Indiana, and has operated a lottery since 1951. During the indictment years he also owned and operated a package liquor business. The title to the store was held by nominees, first by his cousin, and then by his brother. The stated reason for concealing ownership was that under Indiana law one who purchases a federal wagering tax stamp is ineligible to hold a liquor license. The income from the liquor business was reported by the nominees and paid in their name. Petitioner's income tax returns from his gambling operations and real estate holdings were prepared by a certified public accountant from information supplied by petitioner and his bookkeeper. The book-

keeper received the information from petitioner about his gambling operations on slips of paper. She entered the information on his books and then destroyed the slips. (A. 2a)

In the years in question, petitioner timely filed all monthly wagering tax returns and paid the special occupational tax imposed by Section 4411 of Title 26, U.S.C. (A. 88-89). His income tax returns disclosed all his business activities including personal gambling income and his real estate investments (A. 205-247). The income from the liquor store owned by him, but operated in the name of his brother or his cousin was reported by them (A. 68-74), and was not reflected in petitioner's returns.

The investigation of petitioner's returns began in September 1961. He freely informed the agents of his methods of keeping records, the institutions where he banked and the location of his safe deposit box, to which he allowed them access and his real estate holdings, his automobile purchases, and his insurance. (A. 122-127). He also advised the agents of his purchase of the liquor store. (A. 126) He informed the agents that he believed that if the income from that store was correctly reported by others, the tax laws had been complied with. He knew nothing of surtaxes (A. 159-160).

During the investigation by the internal revenue agents petitioner was asked about cash on hand. He said that he kept $15,000 to $17,000 as a gambling fund, but maintained that he had no other cash. After the investigation was completed in March, 1962, petitioner's accountant informed him that, were it to be assumed that petitioner had no cash on hand at the beginning of the indictment years, it would be difficult to explain the increase of his assets if the only source of funds was the taxable income he had reported. Subsequent to this, petitioner informed his

accountant that in 1954 he had a cash hoard of between $50,000 and $60,000, the approximate difference between his net worth and his reported income. (A. 3a) He explained his failure to divulge the existence of the cash was that he believed since he was being examined for the years 1956-1960, the agents' questions pertained only to those years (A. 153-154). Although both petitioner and his bookkeeper testified that there was such a cash accumulation, the bookkeeper admitted that she made a contrary statement to a special agent. She explained that, while she knew that the cash existed in 1954, she did not know whether petitioner still had it in 1956 (A. 84-85).

The district judge made special findings of fact in which he determined that petitioner knew that he should report all his income and "willfully chose not to do so." The judge listed a number of circumstances which convinced him that petitioner had wilfully attempted to evade his income taxes. Among these circumstances were the following: defendant kept only such books as he thought necessary to satisfy the Government under the requirements of federal wagering tax laws; defendant kept these records in such a way that they could not be verified; and defendant owned a liquor store in the name of others. In the estimation of the trial judge, even if the ownership by nominees were merely a scheme to circumvent state law, such conduct placed defendant's credibility "on a very low plane." He also referred to the fact that petitioner handled his affairs in cash and had no bank account, that he kept a little "black book" in which he recorded his personal gambling income but had no other records to verify these amounts; that he had originally denied and later maintained that he had a cash hoard; and finally, that he was unable to make any reasonable explanation for the large discrepancy between admitted net worth and the amounts of income reported in his returns. (A. 3a)

REASONS FOR GRANTING THE WRIT

This Court should exercise its jurisdiction in this case for the following reasons:

1. The sanctioning by the Court of Appeals for the Seventh Circuit of the employment of an erroneous rule of law in a non-jury case is in direct conflict with decisions of the Third and Ninth Circuits.

2. In this case testimony of good character was interpreted not as a factor capable of creating reasonable doubt but, as a vehicle to ally the petitioner with vicious and disreputable elements, in direct conflict with applicable decisions of this Court and Courts of Appeals for the other circuits.

3. This Court in its supervisory power should make it clear that it is a violation of the Sixth Amendment for judges, as well as juries, to arrive at a determination of guilt on knowledge resulting from private investigation, unsworn, not testified to and not subjected to cross-examination.

4. A finding of guilty predicated in part on the failure of a defendant to explain a discrepancy between his admitted net worth and the amount of income reported for the indictment years is in conflict with applicable decisions of this Court and with decisions of other circuits.

I.

Despite the fact that throughout the Court's Special Findings of Fact (A. 269-274), the Court continually characterizes the defendant's state of mind as "wilfull", the Trial Court's understanding of the meaning of "wilfullness" was definitely stated in its finding number 10. (A. 273)

A special request for a finding was made as follows:

> "Will the Court find whether or not the defendant was negligent in the matter of keeping books and records and reporting his income."

The Court's finding number 10 in answer thereto was:

> "Yes, wilfully negligent." (A. 273)

While the phrase "wilfull negligence" appears to be a contradiction in terms, the great weight of authority equates the term "wilfull negligence" with "gross negligence."

In Am. Jur. Volume 38, Gross Negligence, Section 47, Pages 690, 691, it is stated:

> "'Gross negligence' is defined, where recognition is given to degrees of negligence for some purposes, at least, as the want of even slight care. The term has such significance in the law that a statute which incorporates it as an element of liability is not thereby rendered void for want of certainty. While, in the case of gross negligence, various terms have been used to express the mental state of the actor, the idea attempted to be conveyed seems to be that the act is done not inadvertently but wilfully and intentionally with a conscious indifference to consequences . . ."

Wilfull negligence is gross negligence. A conviction cannot be obtained under Section 7201 of the Internal Revenue Code of 1954, where the defendant is found to be grossly negligent, for the statutory requirement is wilfullness. *United States* v. *Glascott,* 7 Cir., 216 F. 2d 487.

In response to the contentions of the petitioner on this account, it was the contention of the Government that, while the words might have been confusing to a jury, they were harmless in a bench trial.

The Court of Appeals for the Seventh Circuit disregarded this contention of the petitioner because in another part of his determination, he adverted to the criteria of wilfullness as set forth in *United States* v. *Martell,* 3 Cir., 199 F. 2d 670 (A. 4a).

It is the position of this petitioner that the trial court's view that he had been wilfully negligent was set forth with certitude and clarity, after deliberation and careful studied consideration of the issue, and must be interpreted to reflect the standard of wilfullness that was applied by the Court in his evaluation of the evidence. It is our respectful submission that an erroneous evaluation of the evidence, the application of an incorrect standard, which is manifest from the detailed written statement of the Court in its special findings conflicts wih the decision of the 9th Circuit in *Wilson* v. *United States,* 250 F. 2d 312.

> "But we are not dealing with a mere error of law occurring during the course of trial and which can be disregarded as harmless. Involved here, (if we are right) is a basic misconception of an essential element of the crime charged against appellant, which in truth is the critical element under the facts. We believe therefore that the comparable and controlling decisions are those jury cases involving the related questions of erroneous instructions. If this case had been tried to a jury and the comments voiced by the learned trial judge had taken the form of jury instructions, a conviction obtained thereunder could not stand under the principles enunciated in the *Murdock* and *Spies* decisions. Is there any difference between a trial judge formally instructing the jury as to what he thinks the applicable law to be and in effect instructing himself similarly in a non-jury case? We think not. In each instance a conviction has resulted from the application of improper standards of law to the facts by the trier of fact. Such a case, we believe, compels reversal of the conviction." *Wilson* v. *United States,* 250 F. 2d 312, 324.

It is our further contention that the decision is in direct conflict with that of the Third Circuit in *United States* v. *Palermo,* 259 F. 2d 872:

> "The rule stated applies to a non-jury case as well as a case tried to a jury; otherwise stated, in determining whether a reversal is required because of erroneous instructions, there is no difference between a trial judge formally instructing the jury as to what he thinks the applicable law to be and, in effect, instructing himself similarly in a non-jury case." *United States* v. *Palermo,* 3 Cir., 259 F. 2d 872, 882.

of that departure by a Court of Appeals, in violation of due process requirements.

II.

In this case six character witnesses testified on behalf of the petitioner. Most of them were people of substance in the negro community in the area of Hammond and East Chicago, Indiana. Two of the six, in their enthusiasm and in apparent ignorance of the limitations for which they were called on as witnesses, elaborated on the petitioner's open-handedness and open-heartedness. However, all six testified to the basic purpose for which they were called, the petitioner's reputation for honesty, fair dealing, truth, veracity—his generally good reputation, which was the issue so far as these witnesses were concerned.

It is apparent that the trial court overlooked that basic issue, and perverted the unnecessary evidence (which he should have ignored) into evidence against the defendant.

> "There has been testimony here by certain witnesses as to the defendant's good character in the community in which he lives. It is apparent that this testimony is based upon two primary observations on the part of the witnesses: One that he was a very generous man, and two, that he paid his bills, his honest bills.

"Generosity on the part of professional gamblers is a part of the modus operandi, it is part of the stock in trade. While they take dollars out of the pockets of the incredulous, they feed back pennies into the local charities and local church organizations for the purpose of buying good will in the community.

"I recall many years ago at the time of the trial of Al Capone, that at the time of his great operations it was reported what a great and benevolent character he was in the City of Chicago, his benevolence to all organizations. So I would say that this testimony does not impress the Court, the fact that he was generous. It was for a purpose, or maybe it was because he was simply built that way and wanted to be generous. I don't know, but it does not overcome the other testimony in the record and the other evidence in the record to the effect that the defendant designedly used any scheme necessary in order to get around the law." (A. 199-200)

On complaint to the United States Court of Appeals, the Court stated only as follows:

"We cannot say, as defendant contends, that the judge failed to consider evidence of defendant's cooperation with the internal revenue agents, his payment of the additional tax liabilities, and character evidence submitted by him." (A. 4a).

It does appear that the Court considered the character evidence, but the consideration given it was illegal and in conflict with the leading decisions of this Court. In the leading case of *Michelson* v. *United States,* 335 U.S. 469, this Court stated at page 476:

"But this line of inquiry firmly denied to the State is opened to the defendant because character is relevant in resolving probabilities of guilt. He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the

offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed. *Edgington* v. *United States,* 164 U.S. 361, 17 S. Ct. 72, 41 L.Ed. 467." *Michelson* v. *United States,* 335 U.S. 469, 476.

It would be an anomaly to direct that a Court should instruct a jury that character evidence is valuable to a defendant, and when a Court sits without a jury to have it employ the same evidence to secure the conviction of the defendant.

The consideration given to character testimony by the trial court, and approved by the Court of Appeals is in conflict with the prevailing rule of this Court's decisions and of other circuits. See *Edgington* v. *United States,* 164 U.S. 361, 366; *Rowe* v. *United States,* 8 Cir., 97 F. 779, 781; *Cohen* v. *United States,* 3 Cir., 282 F. 871, 873; *Baugh* v. *United States,* 9 Cir., 27 F. 2d 257, 261.

III.

The trial court, in its opinion, in finding a likely source for the increased net worth, stated:

"I am not an expert in the field of lottery or the numbers racket, but in going through these books, I was somewhat amazed at the consistency of the wins and losses in any one-month period. The losses ran somewhere between 40 to 55 per cent of the income, almost without variation, which, according to the best information I have, is a very high percentage of loss in this particular kind of business. Generally, the customer is not allowed to participate that heavily in the overall or the gross income. But the consistency with which it runs leads me to suspect, at least, that

the books do not reflect the actual take from this business." (A. 199-200)

There is absolutely nothing in the record to justify such a finding by the Court. In fact, the Court makes it obvious that it secured information from a source outside the Courtroom, and outside the evidence presented. Certainly, a percentage of loss in lottery operations is not a subject of judicial knowledge and notice.

The Court of Appeals for the Seventh Circuit summarily disposes of the petitioner's complaint in this regard saying:

> "Defendant argues that some of the district judge's underlying findings which demonstrate willfulness are not supported by the evidence and that others are contrary to it. Basically, defendant's argument presents a question of the weight of the evidence and not of its sufficiency. Our function is limited to a determination of the latter. The underlying circumstances and inferences alluded to by the trial judge constituted sufficient indicia of defendant's fraud. They find substantial evidentiary support in the record." (A. 4a).

Of course, when there is no evidence but merely a result of a private investigation by the Court, there is no sufficiency of evidence to weigh. We can only speculate as to the basis for the decision of the Court of Appeals. The only speculation available is that the Court of Appeals determined that the trial court considered only proper evidence. However, this is completely negated by the trial court's own expressions, which make it obvious that he did not so confine his considerations.

In *Quercia* v. *United States*, 289 U.S. 466, this Court said at 470:

> ". . . in commenting upon testimony he (the judge) may not assume the role of a witness. He may analyze

and dissect the evidence, but he may neither distort it *or add to it.*" *Quercia* v. *United States,* 289 U.S. 466, 470.

If due process would have been lost by the Court's making the results of his personal investigations known to a jury, we submit there is no difference when he utilizes the results of those investigations in determining the guilt of the petitioner on a bench trial. In fact, while it would be purely speculative as to whether or not his remarks would have influenced the jury, the proof here is positive that his considerations were influenced by extraneous information.

This constitutes a far departure from the accepted and usual course of judicial proceedings by a lower court, and a sanctioning of that departure by a Court of Appeals, in violation of due process requirements.

IV.

In a request for special findings under Rule 23, the petitioner asked the Court to state on what it based its finding of wilfull misconduct and on what certain specific facts and transactions it based such a finding of wilfullness. (A. 271)

The Court's Special Finding of Fact number 7 (A. 271), is as follows:

> "The Court bases its finding on the general conduct that the defendant has demonstrated by the evidence and his complete inability as a witness on his own behalf to explain the disparity between his admitted net worth in each of the taxable years in question, and the amount reported for tax purposes."

In answer to a further request for the Court to find specifically the reasons, the acts or omissions on the part of the petitioner which the Court believes demonstrates and proves that he wilfully failed to report all of his in-

come (A. 271), the Court in its Special Finding of Fact number 8, found, among other things, at the conclusion, the following: (A. 272)

> ". . . and finally, the defendant's complete inability to make any reasonable explanation for the large discrepancy between his admitted net worth and the amount reported for income tax purposes in any of the years covered by the indictment".

These findings by the Court placed the burden on the petitioner to prove his innocence.

It is elemental in our system of jurisprudence that a defendant in a criminal case is presumed innocent until proved guilty, and it is encumbent upon the government to prove his guilt and to prove every element necessary of that guilt. It is not encompassed in our system of law that a defendant charged with crime must prove his innocence.

This Court recognized that in a criminal prosecution for income tax evasion, where the tax discrepancy was based on the net worth method of computation, that Trial Courts might be led into the error of believing that it was the duty of a defendant to explain tax discrepancies.

In *Holland* v. *U.S.*, 348 U.S. 121, 128 (1954), the Court stated:

> "Although it may sound fair to say that the taxpayer can explain the 'bulge' in the net worth, he may be entirely honest and yet unable to recount his financial history. In addition, such a rule would tend to shift the burden of proof. Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Government's case by showing loose business methods or losing the jury through his

apparent evasiveness. Of course, in other criminal prosecutions, juries may disbelieve and convict the innocent, but the Courts must minimize this danger."

In *Mann* v. *U.S.*, 319 F. 2d 404, 409 (CA-5, 1963), the Court stated on Page 409:

"When the words 'so unless the contrary appears from the evidence' were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such an intent or wilfullness, and a barrier almost impossible to hurdle results.

"The quoted charge is subject to another vice."

There can be no presumption of wilfullness drawn from the mere fact of tax liability standing alone. *Holland* v. *U.S.*, 348 U.S. 121 (1954). *Mann* v. *U.S.*, 219 F. 2d 404 (CA-5, 1963). *Lurding* v. *U.S.*, 179 F. 2d 419. (CA-6, 1950):

"The presumption of innocence remains throughout the trial."

Under these findings, where the Trial Court found, as one of the basic elements of wilfullness, the failure of the petitioner to explain his net worth increase, shifted the burden of proof. These findings are in direct contravention of the law as enunciated in *Holland* v. *U.S.*, 348 U.S. 121, 128, immediately above.

This fundamental misconcept of the law by the Trial Court was an error, not only of law, but one breaching

the petitioner's fundamental constitutional right of trial according to our standards of jurisprudence. If such an instruction were given to a jury to the effect that the jury could infer wilfullness from the failure of the defendant to explain his net worth increase, there could be no question that such an instruction would be clearly erroneous. *Wilson* v. *U.S.*, 9 Cir., 250 F. 2d 312, 324.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

JOSEPH M. SOLON,
ANNA R. LAVIN
Attorneys for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14541 SEPTEMBER TERM, 1964 SEPTEMBER SESSION, 1964

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES A. PETERSON,
Defendant-Appellant.

On Appeal from the Judgment of the United States District Court for the Northern District of Indiana.

October 20, 1964

Before DUFFY, KNOCH, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Defendant James A. Peterson appeals from a judgment of conviction for willfully attempting to evade payment of his personal income taxes for the years 1956 through 1960. He was tried on a five-count indictment charging violations of section 7201 of the Internal Revenue Code of 1954.

Defendant waived trial by jury. The district judge, after a court trial, found defendant guilty and sentenced him for a period of two years imprisonment on each of the first four counts of the indictment, the sentences to be served concurrently. Defendant was placed on three years probation on the fifth count, the probationary period to commence following the termination of the prison sentence. A fine was also imposed.

The sole question is whether the district court's ultimate finding of a willful violation is supported by the evidence. A summary of the evidence follows.

The Government used the so-called net worth plus non-deductible expenditures method in establishing defendant's failure to report the correct amount of his income during the years covered by the indictment. The proof showed yearly increases in net income approximately in the same amounts as charged in the indictment. The total unreported income for the five-year period approximated $80,000 and the understated tax liability exceeded $31,000. Defendant stipulated to the correctness of the Government's net worth statement, exclusive of cash on hand, and did not dispute the tax liability. In fact, subsequent to his being indicted he paid the understated amount of tax.

Defendant is a professional gambler in East Chicago, Indiana, and has operated a lottery since 1951. During the indictment years defendant also owned and operated a package liquor business. The title to the store was held by nominees, first by his cousin and then by his brother. The apparent reason for concealing ownership was that under Indiana law one who purchases a federal wagering tax stamp is ineligible to hold a liquor license. The income from the liquor business was reported by the nominees and paid in their name. Defendant's income tax returns from his gambling operations and real estate holdings were prepared by a certified public accountant from information supplied by defendant and his bookkeeper. The bookkeeper received the information from defendant about his gambling operations on slips of paper. She entered the information on his books and then destroyed the slips.

During the investigation by the internal revenue agents defendant was asked about cash on hand. He said that he kept $15,000 to $17,000 as a gambling fund, but maintained that he had no other cash. After the investigation was completed in March, 1962, defendant's accountant informed him that were it to be assumed that defendant

had no cash on hand at the beginning of the indictment years, it would be difficult to explain the increase of his assets if the only source of funds was the taxable income he had reported. It was only subsequent to this that defendant informed his accountant and the agents that in 1954 he had a cash hoard of between $50,000 and $60,000, the approximate difference between his net worth and his reported income. Although both defendant and his bookkeeper testified that there was such a cash accumulation, the bookkeeper admitted that she made a contrary statement to a special agent. The accountant testified that in his opinion, based on information given him by defendant in preparing his tax returns for the years 1953, 1954, and 1955, defendant could not have amassed such an amount during that period. Other testimony tended to show that he could not have accumulated it prior to 1953.

The district judge made special findings of fact in which he determined that defendant knew that he should report all his income and "wiilfully chose not to do so." The judge listed a number of circumstances which convinced him that defendant had willfully attempted to evade his income taxes. Among these circumstances were the following: defendant kept only such books as he thought necessary to satisfy the Government under the requirements of federal wagering tax laws; defendant kept these records in such a way that they could not be verified; and defendant owned a liquor store in the name of others. In the estimation of the judge, even if the ownership by nominees was merely a scheme to circumvent state law, such conduct placed defendant's credibility "on a very low plane." He also referred to the fact that defendant handled his affairs in cash and had no bank account; that he kept a little "black book" in which he recorded his personal gambling income but had no other records to verify these amounts; that he had originally denied and later maintained that he had a cash hoard; and finally, that he was unable to make any reasonable explanation for the large discrepancy between admitted net worth and the amounts of income reported in his returns.

Upon a review of the record we are satisfied that the evidence was sufficient to support the district judge's finding that defendant willfully attempted to evade the payment of substantial sums of income taxes for each of the indictment years.

Defendant argues that some of the district judge's underlying findings which demonstrate willfulness are not supported by the evidence and that others are contrary to it. Basically, defendant's argument presents a question of the weight of the evidence and not of its sufficiency. Our function is limited to a determination of the latter. The underlying circumstances and inferences alluded to by the trial judge constituted sufficient indicia of defendant's fraud. They find substantial evidentiary support in the record.

We cannot say, as defendant contends, that the judge failed to consider evidence of defendant's cooperation with the internal revenue agents, his payment of the additional tax liabilities, and character evidence submitted by him.

After listing the circumstances which he considered persuasive, the district judge commented upon defendant's inability to make "any reasonable explanation" for the large discrepancy between his admitted net worth and the amount reported in his tax returns. Defendant contends this remark imposed upon him the burden of proving his innocence. We disagree. The judge's observation simply went to the weight and credibility of the evidence and did not place the burden of proof upon the defendant.

The district judge stated that the criteria of willfulness which he applied is delineated in *United States* v. *Martell*, 199 F.2d 670 (3d Cir. 1952). In that case the court said that willfulness is a state of mind in which the taxpayer is fully aware of the tax obligation which he seeks to conceal; that willfulness requires an intentional, rather than an inadvertent, act or omission; and that willfulness is characterized by a specific intent to conceal, in con-

trast to a genuine misunderstanding of the law's requirements or a good faith belief that certan income is not taxable. We are in accord with this definition.

Finally, there is no merit in defendant's contention that the district judge refused to comply with rule 23(c) of the Federal Rules of Criminal Procedure by refusing to make special findings of the evidence the judge thought had no bearing on willfulness. Negative findings of this character are not required.

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago 10, Illinois

Tuesday, November 17, 1964

Before
Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

14541 v.

JAMES A. PETERSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Tuesday, October 20, 1964

Before
Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

14541 v.

JAMES A. PETERSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, ... Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

FILED
JAN 29 1965
JOHN F. DAVIS, CLERK

No. 771

In the Supreme Court of the United States

OCTOBER TERM, 1964

JAMES A. PETERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
JOHN B. JONES, Jr.
Acting Assistant Attorney General,
JOSEPH M. HOWARD,
BURTON BERKLEY,
Attorneys,
Department of Justice,
Washington, D.C., 20530.

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JAMES A. PETERSON, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–5a) has not yet been officially reported. The district court wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1964 (Pet. 7a), and a petition for rehearing was denied on November 17, 1964 (Pet. 6a). The petition for a writ of certiorari was filed on December 17, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district judge applied the proper standard of willfulness in determining petitioner's guilt.

2. Whether the district judge properly weighed the reputation evidence adduced by petitioner.

3. Whether the district judge improperly relied upon evidence outside of the record.

4. Whether the district judge erroneously shifted the burden of proof to petitioner.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954 provides:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

On March 13, 1963 (R. 1),[1] a five-count indictment (R. 3–6) was returned in the United States District Court for the Northern District of Indiana, charging petitioner with having willfully attempted to evade

[1] "R." refers to the appendix to petitioner's brief filed in the court of appeals.

and defeat a large portion of his and his wife's income taxes for the years 1956 through 1960 by filing a false and fraudulent return in each of those years,[2] in violation of Section 7201 of the Internal Revenue Code of 1954. A jury having been waived, the court found petitioner guilty on all five counts and sentenced him to two years' imprisonment, a fine of $7,500 plus costs, and probation for a period of three years to begin upon his release from prison (R. 284–285).

The government proved petitioner's underreporting of income and understatement of taxes by showing his net worth plus nondeductible expenditures. The correctness of the government's net worth statement, exclusive of cash on hand, was stipulated to (R. 16–17, 248–258) and the proof disclosed substantial expenditures, particularly for real estate (R. 248–249, 250–253) and automobiles (R. 249, 255). Taken together, this evidence showed that petitioner's net income was approximately the same as that alleged in the indictment (R. 265). The understated tax liabilities on this unreported income totalled $31,469.42 for the five indictment years (R. 109–111, 266). Peti-

[2] The indictment alleged the following unreported income and understated taxes (R. 3–6):

Count	Year	Unreported income	Understated tax
I	1956	$21,331.33	$9,294.44
II	1957	24,971.60	11,070.25
III	1958	5,762.33	2,125.25
IV	1959	9,845.92	3,888.81
V	1960	19,313.09	9,320.99
		81,224.27	35,699.72

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tioner does not dispute the tax liability, and he paid the amount of understated taxes alleged in the indictment on August 19, 1963 (R. 259–262), just slightly more than five months after the indictment was returned against him.

Petitioner is a professional gambler, and has operated a lotter at various times since 1951 (R. 153, 162–165, 16 -170, 176). His income tax returns were prepared in the indictment years by a certified public accountant named Ralph Richard Collins from information supplied by petitioner and his bookkeeper, Katherine Morris (R. 20–26). Katherine Morris kept the books for all of petitioner's businesses, including real estate, gambling, and the Calumet Package Liquor Store (R. 76). Petitioner gave her, on slips of paper, the figures to be entered in the books concerning his gambling income, and these slips were destroyed after the information was entered (R. 77–81). The accountant never examined the books, but merely had his staff transcribe the information for use in preparing the tax returns (R. 22).

During the indictment years, petitioner used nominees (his brother and a cousin) to conceal his ownership of the liquor store (R. 27–34, 36, 44-45, 62–73, 158–160). The income from this store was reported by the nominees and the taxes were paid in their names (R. 27–34, 158–160).[3] The accountant

[3] Most of the difference between the amount of unreported taxes alleged in the indictment and that proved by the evidence is attributed to credits made at the trial for the amount of taxes paid in the names of the nominees for the Calumet Package Liquor Store in these years (R. 44, 114–115, 266).

was never told of petitioner's ownership of the liquor store during the indictment years, and, at petitioner's request, he prepared the nominees' income tax returns in which the liquor store income was reported (R. 27–34, 36, 62).

The government's proof of net worth allowed $16,000 cash on hand for each year (R. 34–35, 51, 265). During the investigation petitioner was asked about cash on hand (R. 34). He told the agents that he kept fifteen to seventeen thousand dollars as his gambling fund, but he denied having any other substantial cash (R. 34–35, 138–141). Petitioner told the agents that he "invested every dime * * * [he] got" (R. 139), and so he never accumulated any large amounts of cash (R. 139–140).

In March 1962, after the investigation was completed, petitioner and his representatives met with representatives from the Service, and the government's net worth statement was discussed (R. 36–37). After this conference petitioner's accountant explained to him that, if it be assumed that petitioner started with no cash on hand, it would be difficult to account for the assets he acquired during the indictment years if his only source of funds was the taxable income he had reported (R. 39–41). Petitioner said that he had received no gifts or bequests, and that he had no cash on hand except for his working fund (R. 40–41).

Petitioner's attorney then told the accountant to determine exactly what petitioner's net worth amounted to for each of the subject years (R. 54–55).

The accountant's initial determination indicated a net worth increase of $13,000, but a later one showed an increase of $50,000 (R. 55). This latter figure was discussed with petitioner by his attorney and his accountant (R. 55–56). At that time petitioner still did not mention additional cash but in July, 1962, petitioner told his representatives that he had had a cash hoard amounting to between $50,000 and $60,000 (R. 41, 56). Katherine Morris, petitioner's bookkeeper, also informed the accountant that she had seen and counted cash amounting to $60,000 (R. 56–57).

Both petitioner and his bookkeeper testified at the trial that this cash hoard existed in 1954 (R. 83–85, 153–154, 170–172). Petitioner admitted having borrowed money during years when he allegedly had this cash or was accumulating it (R. 171–172). Petitioner's bookkeeper admitted having told the special agent that there was no cash hoard, but claimed that this had been an untruthful answer (R. 83). Petitioner's accountant testified that, in his expert opinion, based upon the income figures given him by petitioner to prepare his income tax returns for 1953, 1954 and 1955, petitioner could not have accumulated a cash hoard in those years (R. 57–58). A reconstruction of petitioner's maximum earnings over the years from his tax returns showed that these earnings for the years 1935 through 1955 could at most have totalled only $66,942.11 (R. 94–96, 264).

The government's evidence showed that petitioner never maintained a checking account, and that he dealt solely in cash (R. 42, 81).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 8-11) that the district judge applied the wrong legal test of willfulness. In his request for special findings of fact, petitioner asked the court to state the "legal definition of willfulness" which it was applying (R. 269). In both his special findings (R. 274) and his oral opinion (R. 196), the district judge stated that he used the legal test set forth in *United States* v. *Martell*, 199 F. 2d 670, 672 (C.A. 3):

> Willfulness is * * * best defined as a state of mind of the taxpayer wherein he is fully aware of the existence of a tax obligation to the government which he seeks to conceal. A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable.

Petitioner cannot quarrel with this definition, which his counsel cited to the trial judge (R. 196).

The evidence of willfulness adduced by the Government in the case at bar clearly meets this standard. There was uncontested "evidence of a consistent pattern of underreporting large amounts of income, and of the failure on * * * [petitioner's] part to include all of * * * [his] income in * * * [his] books and records."[4] *Holland* v. *United States*, 348 U.S. 121,

[4] Since petitioner's records were kept in a manner which made it impossible to verify them (R. 21, 22, 25–26, 78, 197, 271–272), their evidentiary value was no better than petitioner's credibility, which the court found to be "on a very low plane" and "not worthy of much credence" (R. 199, 272).

139. He used nominees to conceal his ownership of the package liquor store.[5] Cf. *United States* v. *Holovachka,* 314 F. 2d 345, 358 (C.A. 7), certiorari denied, 374 U.S. 809. He invented a fictitious cash hoard after the conclusion of the investigation. Finally, he did not maintain a checking account and dealt solely in cash. Cf. *United States* v. *Holovachka, supra.*

Petitioner's argument is based solely on the fact that one of the trial court's specific findings was that he had been "willfully negligent" in keeping his books and reporting his income (R. 273). Use of the word "negligent" in a charge to a jury might justify reversal, even though the charge taken as a whole was not erroneous, since there is no way of telling whether the jury improperly relied on this particular portion of the charge. Here, however, the trial was by the court. It is clear from the other findings (R. 269-274) that what the trial court meant was that petitioner had willfully kept inaccurate records and had willfully omitted a large part of his income from his returns, all with the intent of evading taxes which he knew to be due and owing. Thus, the court found that petitioner had willfully, not negligently, evaded taxes and this finding was sufficient under the statute. The cases upon which petitioner relies (*Wilson* v.

[5] Even if petitioner's principal purpose in doing this was to evade the Indiana law prohibiting professional gamblers from holding liquor licenses (R. 159), it still shows willfulness, for it was "conduct, the likely effect of which would be to mislead or conceal * * * [and] [i]f the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." *Spies* v. *United States*, 317 U.S. 492, 499.

United States, 250 F. 2d 312 (C.A. 9), and *United States* v. *Palermo,* 259 F. 2d 872 (C.A. 3)) are inapposite for in each the trial judge appeared to equate gross negligence with willfulness.

2. Petitioner's contention (Pet. 11–13) that the court did not give proper weight to the evidence concerning his reputation is frivolous. We submit it is obvious from the quoted words themselves (Pet. 11–12) that the court was merely stating the reasons why it did not feel that this evidence was strong enough to overcome the overwhelming evidence of guilt that was introduced by the government. The cases upon which petitioner relies (Pet. 12–13) hold only that the trier of fact should consider reputation evidence, as the court did here, not that such evidence *must* be believed and *requires* an acquittal.

3. Equally without basis is petitioner's contention (Pet. 13–15) that the trial court's guilty verdict was based upon evidence not in the record. The only disputed issue presented at the trial was willfulness. In answer to petitioner's request for a special finding as to what facts the court felt proved willfulness, the court answered (R. 271–272):

> 8. The facts and circumstances most convincing to the Court are that the defendant, although he employed a competent part-time bookkeeper, kept only such records as he thought necessary to satisfy the government under the requirements of the gambling tax act and these records were kept in such a way that they could not be verified; that when interviewed early in the investigation he as-

serted that he had no cash hoard at the beginning of the period but subsequently reported and testified at the trial that he had $60,000 in cash at the beginning of the period; at the same time he testified to income for the years prior to 1956 which could not possibly have resulted in an accumulation of a cash hoard prior to that time. His story relative to the ownership and operation of a package liquor store demonstrated either a deliberate attempt to avoid income tax liability or to circumvent the Indiana laws prohibiting the operation of liquor stores by a professional gambler, either of which purposes demonstrates a willful intent to circumvent the laws and places defendant's credibility on a very low plane; the fact that even though he admittedly handled very large sums of money he had no bank account but handled all of his transactions in cash which he kept mostly in an office safe; the fact that he kept "a little black book," in which he recorded his personal gambling income for certain years which he dutifully reported for those years but had no such records or made no such reports for others, strongly contradicts his only explanation for the so-called cash hoard because if he had such a hoard he had not reported it for tax purposes while his records of such transactions in other years indicated that he knew that such income had to be reported for income tax purposes so if he had accumulated a cash hoard from personal gambling he had willfully and deliberately failed to report it for tax purposes, and finally, the defendant's complete inability to make any rea-

> sonable explanation for the large discrepancy between his admitted net worth and the amount reported for income tax purposes in any of the years covered by the indictment.

This finding makes clear that the judge based his determination of willfulness solely on evidence in the record. Petitioner relies (Pet. 13–14) on a relatively insignificant comment in the oral opinion that the uncanny consistency of wins and losses shown on petitioner's books indicated that the books were not accurate. The trier of fact may of course draw such inferences from the evidence as to its credibility.

4. There is no substance to petitioner's final contention (Pet. 15–18) that the court shifted the burden of proof to him. As the quotation above shows, the court enumerated the many factors showing petitioner's willfulness before it commented upon his failure to give a reasonable explanation for the great disparity between his admitted net worth increases and his reported income. Thus, it is clear that the court was not shifting the burden of proof, but was merely restating this Court's long-established legal principle that, in all criminal prosecutions, "[o]nce the Government has established its case, the defendant remains quiet at his peril".[6] *Holland* v. *United States*, 348 U.S. 121, 138–139; *Yee Hem* v. *United States*, 268 U.S. 178, 185.

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[6] It might be noted that in the instant case the defendant took the even more perilous course of taking the stand and, as the court found (R. 199, 272), testifying untruthfully.

CONCLUSION

For the reasons set forth above, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
JOHN B. JONES, JR.,
Acting Assistant Attorney General.
JOSEPH M. HOWARD,
BURTON BERKLEY,
Attorneys.

JANUARY 1965.